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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, JR.,

Respondents

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, Johnnie Pruett, and files this Reply to the Brief in opposition, filed by the State of Texas.

The Court Has Jurisdiction of the Questions Presented Because Same Were Urged Before the Court of Criminal Appeals

By brief, hereinbefore filed, Respondent Clawson has substantially agreed with Petitioner. However, the Respondent the State of Texas now questions jurisdiction here on a basis which, we think, indicates that it is unfamiliar with the record. It says the questions here presented were not presented to the Court of Criminal Appeals. The truth is that such questions were presented and emphatically urged—and fairly urged.

Respondent Clawson, even, urged the constitutional questions in oral argument and by brief in the Court of Criminal Appeals. In oral argument before the Court of Criminal Appeals, Respondent Clawson argued: (by counsel)

> "The reason is * * * North Carolina vs. Pearce and * * * also the Robinson vs. Beto case. These are cited in the brief and, of course the Court is well aware of them. Put those two cases together and this Court's opinion in Ex Parte Griffin and I think you can pretty well sum up this. That if a man is entitled, as this Court has said he is, to full credit for time laying in jail pending an appeal, then it's only a logical step to say that he is entitled to good time there because of this particular reason: If the man had not appealed, had not exercised his right of appeal and the avenue opened up to him by the statutes, then he would not have had to worry about the sheriff having any discretion or giving him good

time credit. He would have gone on down to the Department of Corrections where they wanted to get rid of him fast. He would have gotten thirty days credit the day he got there and would have been out with every possible credit in all probability. But if he appealed, then this Court would be saying that if you appeal, then you are going to get straight time and nothing else which is actually putting a penalty on the right of a man to appeal who is lying in jail because he can't make bond.

"I think clearly under the Pearce case, under the Robinson case, and under this Court's opinion in the Griffin case, that is unconstitutional and a right that a district judge in the State of Texas, sitting as Judge Clawson did, had to observe, had to take cognizance of and had to protect as this Court said in Bennett and in North Carolina vs. Pearce."

* * * *

"JUDGE DOUGLAS: Since 42.09 and these other articles appear to deal with cases on appeal, you still think the judge can come back and grant credit under 5118a even though that statute says this action will be applicable to a fine or jail sentence or to both?

"MR. BURLESON: I think the statute applies, in my judgment, to inmates of the county jail. Across the board. That's my opinion. And I think it is not compelled by the wording of the statute. *It's compelled by the Constitution which says that we are all going to be treated the same.* And if we have to construe this statute or even ignore it and say the judge has inherent power,

either way, go either direction, I think we still have to give this boy credit to give him *equal process or protection under the law.*"

As disclosed in the Petitioner's Petition for Writ of Certiorari, pages 14, 36-55, the constitutional issues were specifically raised by Petitioner before the Court of Criminal Appeals and urged upon that Court, not only by Respondent Clawson, but also by Petitioner. In oral argument before the Court of Criminal Appeals, Petitioner argued through his counsel:

"MR. TISINGER: Now, may it please the Court. The person, Johnnie Pruett—may it be stipulated that he has been discharged?

"MR. VOLLERS: Yes.

"MR. TISINGER: He therefore has a vested right. He has been discharged by a court of competent jurisdiction. *I don't think, under North Carolina vs. Pearce and all the other authorities as cited in our petition to dismiss, Intervenor's* Petition to Dismiss, which I hope the Court will read even though they have already overruled the motion, that under all of those authorities, I don't think there is any ambiguity that we need to be worried about."

* * * *

"Now, North Carolina vs. Pearce says that you've got to give him all his time. And I'm acquainted with Judge Onion's opinion and this Court's opinion previously announced that that

doesn't necessarily mean pre-sentence time. I'm also acquainted with what Judge Onion said that maybe the way is open, I believe it was in Bennet vs. State or maybe the Griffin case, in one of the cases he said the way may still be open as respect to pre-sentence time. I'm aware of all these things, may it please the Court. *But in any event, North Carolina vs. Pearce, Pearce vs. North Carolina said, and this Court quoted this language: That credit for good time must be included when you credit them with the time on appeal.*"

* * * *

"Now, but supposing that I am wrong and supposing that Article 5118a cannot be applied because in line with one Attorney General's Opinion, it was meant to apply only to misdemeanors. * * * —you've still got to face the penitentiary statute which is * * * 6184L which gives twenty days out of thirty for good conduct.

"*Now, is Johnnie Pruett neither fish nor fowl? Is because he simply took an appeal on the one hand, he can't get the benefit of the sheriff's statute and because he's not yet in the penitentiary, he can't get the benefit of the penitentiary statute, may it please this Court?* Those Tennessee cases that I cited say no. This man may be a criminal. We'll assume he is a criminal. But he is entitled as a civilian *to equal protection of the law of the United States.*"

"JUDGE DOUGLAS: What did that mean on the part of the insanity where he is in the hospital? He doesn't get anything but actual time. Would this knock out the statute? Is it your con-

tention that it would knock out that statute?

"MR. TISINGER: I'm just like Counsel, Your Honor. I'm not familiar with it. I respectfully beg leave to file an amended brief. I did, in the little time I had, exhaust myself, if I didn't exhaust the law on this proposition. And I would like to see that case because I don't know. Whatever it might say, if it please the Court, whatever it may say, how will it confound the holding in North Carolina vs. Pearce or Pearce vs. North Carolina which says you've got to give them all of their time?

"Now, I'm mindful of the language in one of Judge Onion's opinions that says, well, in North Carolina vs. Pearce * * * they are talking about prison time and not talking about time in jail. But may it please the Court, that was written before the Beto case had gone up to the Circuit Court. And however much difference that would make to Your Honors, I wouldn't presume to say. But I do know from your opinions that Your Honor is mistaken about the thing that I am thinking about now. And I know that in my opinion, *it's just not right to distinguish between time in jail and time in prison.* As counsel said, he would be a lot better off for a man to be in prison, as far as he's concerned and that would be a distinction without a difference, may it please the Court."

Then the State itself took up the issue in oral argument before the Court of Criminal Appeals:

* * * *

"But back to *the primary question* and that is the—I believe *it is really raised as an equal protection question* as to whether or not since the jail time statute, which obviously allows the sheriff to give the man credit for time in jail on a misdemeanor sentence either for fine or jail time, must be applied to a man awaiting the outcome of his appeal. I think that the argument so far has ignored the question, the basic difference between this and the penitentiary statute, which requires that a certain good time credit be given to a man in the penitentiaary unless a certain charge of misconduct is substantiated against him. There is no requirement in this statute that the good time be given. It's strictly a "may" statute. It says that the sheriff may give credit."

"In this case, under North Carolina vs. Pearce, under Robinson, under Griffin, all of these cases, the State has no objection to the fact that this man is entitled to credit for the time he has served. This is the penalty which has been exacted to which he is entitled to credit. However, he is not in a position under the authority of the statute to be entitled to credit for this reward. *And the equal protection clause says nothing about this reward nor does it say anything about the same thing,* as far as I know, it has not been applied to the cases of this Court which it has seen in the past that a man who is serving time in the penitentiary, who for some reason either by bench warratn or what have you is outside of the jurisdiction of the penal authorities of the State of Texas, he is not entitled to good time while serving on a sentence in the penitentiary.

"Of course, if he is held by reason of that order, he is entitled to credit for the time served but not

for good time during that period of time. And I think the biggest distinction is between the fact that this is the opportunity for the sheriff who has the custody of a man on a misdemeanor charge to reward him for his good conduct as well as the opportunity for the penal authorities to reward a man for his good conduct. *But we have a gap in our statutes which do not provide for any man, once he pleads guilty to start getting day for day time, whether he appeals or not because if he pleads guilty on a felony while he's awaiting transfer to the penitentiary, he gets day for day time because he is not in a position where the statute authorizes anyone to reward him for his good behavior nor is he penalized for his bad behavior in any way by losing credit for good time.*"

Judge Clawson's counsel replied:

"But in this case, Johnnie Pruett—I don't know the boy. He was apparently of good enough behavior to where nobody really made any note of it and certainly didn't follow the statute and keep a record of it or anything like that. And the real distinction—and *I take issue with State's counsel here on this equal protection thing.* I say here—I agree with him, it's equal protection question in a way. But the equal protection is not equating the "shall" and "may" and the disinction like that because *I think those all go out the window really when Constitutional questions are involved.*

"Our 42.03 says the Judge may at his discretion, but, really, this Court has already said he doesn't have any discretion any more. That's a "may" statute. *The "may" and "shall" mean noth-*

ing when you are dealing with equal protection. What must be equal is this: The man who appeals must be treated equally with the man who does not appeal. And there is no way this record can be looked at where Johnnie Pruett would have been treated equally if Judge Clawson had not given him credit for his good time."

* * * *

"So it seems to me, gentlemen, that you have already decided that the district judge does not have the authority to discharge a man. And suppose —just answer this one last question in your mind. Suppose that a district judge, as Judge Clawson, suppose instead of nineteen months, this boy had been in that jail twenty-six months. He had a twenty-four months sentence. Is there a man here who would say that Judge Clawson, when he had him in front of him, couldn't discharge him? That he had to send him to the pen?

"*JUDGE ONION:* Would he have done so under the provisions of Article 42.03 and *North Carolina vs. Pearce* or for twenty-six months, would he have had to rely at all on 5118a?

MR. BURLESON: He would have had to—that's true. But the question is the power to discharge. Now, all he had to do was give him credit. If he gives the credit, one kind of credit is much like another. If he gives it fairly according to an acceptable standard, appears to me that it makes no difference, what the source of the credit is as long as it's fair and it's *evenly* applied. And if you say he can—he can discharge a man who has twenty-six months jail time on a twenty-

four month sentence, then he can discharge a man with good time, also."

"Thank you."

Then Petitioner argued:

"MR. TISINGER: May I have forty-five seconds?

"JUDGE ONION: All right. We'll give you forty-five seconds.

"MR. TISINGER: Thank you.

"May it please the Court—

"JUDGE ONION: *Mr. Timekeeper, please note.*

"MR. TISINGER: We are not limited by Article 5118A and that would be a straw man. In the brief that we filed with Judge Clawson, we also referred him to 6184L where the man would be entitled to at least one-third. And therefore, the mere fact that Judge Clawson gave one-third time does not mean that he limited himself to 5118A. And, as stated by Judge Onion in Bennett vs. State and by the *Court in North Carolina vs. Pearce*, the *time subtracted must also "include time credited for good behavior."*

"JUDGE ONION: Thank you, counsel."

* * * * * *

The Opinion of the Court of Criminal Appeals notes

that Petitioner had offered a brief in the trial court in which was cited both *North Carolina v. Pearce*, 395 U. S. 711, and *Robinson v. Beto*, 426 F. (2) 797. (Such notation is copied with the whole Opinion in the Petition for Certiorari, Appendix A, page 27)

Such brief was offered in evidence before the Court of Criminal Appeals and was received by it. The brief appears here in the Petition for Certiorari, Appendix C, page 58. In that brief, Appendix C page 59, we said:

> "In the *Pearce* case, just cited above, the *Supreme Court of the United States said that credit must be given "for punishment already endured"; and that such must "be fully subtracted." ' 89 Sup. Ct. 2072, 2077. The Court in that case also said that the time subtracted must also include the time "credited for good behavior."* (italics supplied)
> "In the *Robinson* case, cited above, it was specifically held that credit must be given for time in jail pending appeal; and Judge Onion in the *Griffith* case, cited above, followed the *Robinson* case and held that the effect of the *Robinson* case was to destroy the trial court's discretion under Article 42.03 as to granting credit for time in jail pending appeal, and that *Robinson* means such credit must be given by subtracting from the total time given in the sentence. (457 S. W. (2) 65)
>
> "The reasoning behind both the *Robinson* and *Griffith* cases is that to leave it discretionary with the judge whether jail time will be subtracted is to deter a defendant from appealing out of fear that it will cost him time if his appeal is unsuccessful, and *that such deterrence is a denial of due process.* (italics supplied)"

In that Brief, Petitioner also said, Appendix C, pages 62-63:

> "Article 6184 l requires the credit set forth and says it "*shall*" be allowed. The fact that Article 5118a uses the word "may" must be ignored because to allow unlimited discretion is to allow invasion of legislative powers, but "may" must also be ignored for constitutional reasons. *It would deny the equal protection of the laws, within the meaning of the 14th Amendment to the Constitution of the United States, to say that felons must be granted credits but that county jail inmates need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not the class of county jail inmate contemplated by Article 5118a. He is entitled to the equal protection of the laws.* (italics supplied) Such was the holding in *Gilliam v. State* (Tenn. 1939) 126 S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent to the penitentiary he would have received credits under the penitentiary code. The workhouse statute did not provide for credits and did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse."

In Petitioner's Motion to Dismiss (Appendix B, page 44-48) filed in the Court of Criminal Appeals, it was stated:

"(3) Jurisdiction to sentence or resentence is given only to the District Court. Article 42.03 of the Code of Criminal Procedure expressly gives jurisdiction to resentence, after issuance of the mandate of the Court of Criminal Appeals to the District Court. The jurisdiction given by said Article is not to perform a ministerial function but to exercise judicial discretion, find the facts, and subtract at the very least the time spent in jail pending appeal. Ex parte *Griffith* (Tex. Cr. Ap.) 457 S. W. (2) 60. According to *North Carolina v. Pearce,* 395 U. S. 711, 89 S. Ct. 2072, the time subtracted must be all of the time in jail, and credit "for punishment already endured" must be fully subtracted. 89 Sup. Ct. 2072, 2077. *The time subtracted must also include time for good behavior.*" (89 Sup. Ct. 2077, footnote 13, recognized by Judge Onion in *Bennett v. State*, at 450 S. W. (2) 652-657."

* * * *

"Article 6184 l requires the credit set forth therein and says it "shall" be allowed. The fact that Article 5119a uses the word "may" must be ignored, because to allow unlimited discretion is to allow an invasion of legislative powers, and "may" *must also be ignored for constitutional reasons. It would deny the equal protection clause of the United States Constitution to say that felons in the pen must be granted credits, but that felons in county jail need not be. Likewise, it would be unconstitutional argument to say that Johnnie Pruett has been neither fish nor fowl because he is not in the penitentiary and he is not in the class of county jail inmates contemplated by Article 5118a.* (italics supplied) Such was the holding in *Gilliam v. State* (Tenn. 1939), 126

S. W. (2) 305, where the offense was a felony but the trial judge in his discretion sentenced the prisoner to the County Workhouse, as the statute permitted. If the prisoner had been sent on to the Pen he would have received credits under the penientiary code. The workhouse statute did not provide for record keeping, as did the penitentiary statute. The Court held that the prisoner's right to credit could not be defeated by sending him to the workhouse, and that the statute providing for credits was a part of his sentence, and, furthermore, that the failure of the county workhouse administrator to keep records, saying whether the prisoner had shown good conduct, or bad conduct, did not prevent the court, in the absence of such records, from presuming that the conduct was good."

On Page 50 of the Petition for Certiorari (Appendix B) is copied Petitioner's Plea for Relief in the Court of Criminal Appeals, where he alternatively asked the Court of Criminal Appeals to *itself* enter an order of discharge, saying to the Court of Criminal Appeals that if it had jurisdiction, and if Judge Clawson did not, *constitutional requirements compelled Johnnie Pruett's discharge.*

We say it would be an exercise in futility to force us now to go back to the Court of Criminal Appeals. Although we have duly preserved the point that we were denied procedural due process by the summary manner in which the Court of Criminal Appeals disposed of our Motions and refused us leave to intervene, and although we have not yet waived the procedural due process point, what we are now urging, in the main, is that we cannot now go back to the trial

court under Article 11.07 because the Court of Criminal Appeals has distinctly told Judge Clawson *not* to grant any relief for "good time." This means we would now have to go back to the Court of Criminal Appeals and go through the futile exercise of presenting the same arguments we have already presented. The Federal Courts do not require any such exercise in futility, even in the case of a collateral attack, which this is not. Sokol, *Federal Habeas Corpus*, 2nd Ed. 1939, Page 172-175.

The Supreme Court of the United States has said that absolute exhaustion of all State remedies is unnecessary when circumstances make it really impractical, and that a United States District Judge, sitting on an application for the Great Writ has the power in his discretion to dispense with such exercises in futility. *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 Led (2) 837; *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 Led 469; *Roberts v. Lavallee*, 389 U.S. 40. "*The rule of exhaustion is not one defining power* but one which relates to the appropriate exercise of this power." *Bowen v. Johnston*, 306 U.S. 19, 27. "This is not a case in which there is any substantial state interest in ruling again on petitioner's case." *Roberts v. LaVallee*, 389 U.S. 40, 43, 88 S. Ct. 194, 196.

We have already applied for relief to the Court of Criminal Appeals; and repetitious applications are not required. *Brown v. Allen*, 344 U.S. 443, 449, 487, 73 S. Ct. 397, 403, 422. Since this is not a habeas case, but a direct review, the "exercise in futility" should for even more cogent reasons not be required.

The authorities on exhaustion of remedies are collected with respect to Federal habeas corpus in Sokol "Federal Habeas Corpus" Second Edition, copyright, 1969, Pages 159-176.

The State remedy must be "effective" 28 U.S.C., Sec. 2254 (b).

ARGUMENT AND AUTHORITIES

(1) *Procedural Due Process was denied Petitioner by the Court of Criminal Appeals refusing to allow Petitioner to Intervene in this mandamus action.*

The procedure contemplated by Article 11.07 was not available to Petitioner, because Petitioner had already been *discharged.* Petitioner's complaint here is that the Court of Criminal Appeals ordered him committed *again.* The State makes now the spurious argument that Petitioner was bound to sit still, let his liberty be taken away, and *then* go through the futile gestures of habeas corpus before the same Court of Criminal Appeals that said he had no rights.

The statement on page 7 of the Brief in Opposition: "At no time has petitioner presented the constitutional issues which he now raises to the convicting court for a writ of habeas corpus returnable to the Texas Court of Criminal Appeals to determine whether he is entitled to relief" is a misleading statemet. Petitioner could not go back to the convicting court, because that

same court had discharged him, and it had been ordered by the Court of Criminal Appeals to reincarcerate him. He was at *liberty.* The writ could not be returnable to the Court of Criminal Appeals because it had already said it would not entertain a rehearing.

(2) *Petitioner was denied his Constitutional Rights when he was denied eligibility for good time credit while in the county jail awaiting appeal.*

The State speaks of the "reward" as though it were a gift. It is not. It is something *earned* and vested, *Ex Parte Anderson,* 192 S. W. (2) 280 (Tex. Cr. App. 1946)

The State only *surmises* a Legislative distinction between those finally convicted and those who are not, states "it would appear" that such distinction is valid, and that petitioner has not reached a status where good behavior is encouraged. In other words, he will be denied equal protection of the laws!

It is just as harsh to deny Petitioner good conduct time as it is to deny him actual time. All others receive good conduct time, whether they are in the county jail or in the penitentiary. The effect is to penalize him for taking an appeal.

The distinction urged is insubstantial. The principles in the case of *Baldwin v. Smith,* 316 F. Supp. 670 (D. Ct. Vt. 1970) are respectfully urged again.

The Federal Constitution may not require the granting of a right, a privilege, a power, or an immunity, in the first instance by a State. But once the State begins upon a program, the Federal Constitution requires that every right or privilege granted, every power granted, and every immunity granted must be extended to all. Antieau, Modern Constitutional Law 1969, 397-400, 562-650. (Vol. 1)

CONCLUSION AND PRAYER

The State would have the Court look the other way. The State contends that the issues are not necessary to be decided because it was not necessary for the Court of Criminal Appeals to decide them. The Court of Criminal Appeals did look the other way. It deliberately ignored Petitioner, in spite of the fact that North Carolina v. Pearce was expressly called to its attention. It had to look the other way to decide the case the way it did. But the Constitution of the United States will not be ignored in this Court. We respectfully pray for summary judgment and general relief.

Respectfully submitted

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